57TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { DOCUMENT No. 362.

GROWTH OF THE CRIMINAL LAW OF THE UNITED STATES.

LETTER

FROM

THE SECRETARY OF STATE,

TRANSMITTING

COMMUNICATION FROM HON. SAMUEL J. BARROWS, OF THE INTERNATIONAL PRISON COMMISSION.

FEBRUARY 4, 1902.—Referred to the Committee on the Judiciary and ordered to be printed.

DEPARTMENT OF STATE,
Washington, February 3, 1902.

SIR: I have the honor to transmit herewith copy of a communication from Mr. Samuel J. Barrows, United States Commissioner for the International Prison Commission, inclosing, as forming one of the reports of that Commission, a copy of an address by the Hon. David K. Watson, one of the Commissioners to revise the Federal Statutes, on "The Growth of the Criminal Law of the United States."

I have the honor to be, sir, your obedient servant,

JOHN HAY.

Hon. DAVID B. HENDERSON,
Speaker of the House of Representatives.

INTERNATIONAL PRISON COMMISSION,
New York City, February 1, 1902.

SIR: In view of the great interest at home and abroad in the proposed revision of the criminal code of the United States, I have the honor to transmit herewith copy of an address by Hon. David K. Watson, one of the Commissioners to revise the Federal Statutes on "The Growth of the Criminal Law of the United States." I respect-

fully request that the same may be transmitted to Congress, to form one of the reports of the International Prison Commission.

I have the honor to be, sir, your obedient servant,

SAMUEL J. BARROWS,
United States Commissioner for the International Prison Commission.

Hon. JOHN HAY,
Secretary of State, Washington, D. C.

GROWTH OF THE CRIMINAL LAW OF THE UNITED STATES.

By DAVID K. WATSON.

AN ADDRESS DELIVERED BEFORE THE COLUMBIAN LAW SCHOOL, WASHINGTON, D. C.

GENTLEMEN OF THE COLUMBIAN LAW SCHOOL: I have thought it would be appropriate to call your attention to the provisions of the Federal Constitution which refer to crimes, to trace the growth of the criminal law of the United States, and show that it is the result of Federal legislation passed as the necessities of the Government and the interests of society demanded.

The Constitution, as adopted, was strangely defective in its provisions relating to crimes and criminal procedure.

It provided:

Constitutional provisions.

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

It also defined treason and provided that no person should be convicted thereof unless on the testimony of two witnesses to the same overt act, or on confession in open court, and that Congress should have power to declare the punishment of treason, but that no attainder of treason should work corruption of blood or forfeiture except during the life of the person attainted; that Congress should have the power to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and offenses against the law of nations. These were the most important provisions of the Constitution on the subject of crimes.

The great safeguards relating to personal liberty and rights:

Amendments.

That no person should be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury; that no person should be subject for the same offense to be twice put in jeopardy of life or limb; that no person should be compelled in any criminal case to be a witness against himself; that no person should be deprived of life, liberty, or property without due process of law; that in all criminal prosecutions the accused should have a speedy and public trial by an impartial jury; that he should be informed of the nature and cause of the accusation; that he should be confronted with the witnesses against him; that he should have compulsory process in his favor; that he should have assistance of counsel for his defense; that excessive bail should not be required; that excessive fines should not be imposed; that cruel and

unusual punishments should not be inflicted, are not embraced in the original Constitution, but are contained in the fifth, sixth, and eighth amendments thereto. Various reasons why these provisions were omitted from the Constitution have been assigned by eminent statesmen and jurists, some of whom were members of the Constitutional Convention; but whatever may have been the cause, it is certain that we find them in the amendments and not in the original instrument.

No common-law crimes.

There are no common-law crimes in the United States, though for some years in the beginning of the Government it was thought otherwise, and our learned first Chief Justice, Mr. Jay, in his charge to the grand jury in the city of Richmond, on the 22d of May, 1793, in the case of United States *v.* Henfield, used this language: "The United States are in a state of neutrality relative to all the powers at war, and that it is their duty, their interest, and their disposition to maintain it; that, therefore, they who commit, aid, or abet hostilities against these powers, or either of them, offend against the laws of the United States, and ought to be punished; and consequently, that it is your duty, gentlemen to inquire into and present all such of these offenses as you shall find to have been committed within this district."

The law announced in this charge was followed with approval by Mr. Justice Wilson of the Supreme Court in his charge to the grand jury in Philadelphia on the 22d of July following, and subsequently by other able Federal jurists. It was, indeed, accepted as the law, that common-law crimes prevailed in the United States until Mr. Justice Chase denied it while presiding on the circuit in the case of the United States against Worrall, tried in Philadelphia in 1798.

The question first came before the Supreme Court in the case of United States *v.* Hudson et al. (7 Cranch., 32), where Justice Johnson, in delivering the opinion of the court, said:

> Of all the courts which the United States may under their general powers constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution, and of which the legislative power can not deprive it. All other courts created by the general acts possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the General Government will authorize them to confer. * * * The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense. Certain implied powers must necessarily result to our courts of justice from the nature of their institution. The jurisdiction of crimes against the State is not among those powers. To fine for contempt—imprison for contumacy—enforce the observance of order, etc., are powers which can not be dispensed with in a court, because they are necessary to the exercise of all others, and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases we are of opinion is not within their implied powers.

The same doctrine was again announced in State of Pennsylvania *v.* Wheeling Bridge Co. (13 Howard, 563), where Mr. Justice McLean, in delivering the opinion of the court, said:

> It is admitted that the Federal courts have no jurisdiction of common-law offenses and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction.

These early opinions have been followed in the more recent cases of United States *v.* Britton (108 U. S., 206), Jones *v.* United States (137 U. S., 211), Manchester *v.* Massachusetts (139 U. S., 262), and United States *v.* Eaton (144 U. S., 677).

We start, therefore, with the knowledge that the source of the

criminal jurisdiction of the Federal courts is found in the Federal statutes, and that they alone constitute the source of our vast system of law for the punishment of crimes against the Government or within the jurisdiction of the Government.

First crimes act.

The first Federal crimes act was the ninth act passed by the second session of the First Congress, and the thirty-sixth act passed by that Congress. It was signed by Frederick Augustus Muhlenberg, as Speaker of the House of Representatives, and by John Adams, as Vice-President, and President of the Senate, and approved by President Washington on the 30th of April, 1790, almost fourteen months after the establishment of the Government.

There is uncertainty as to the authorship of the bill, but from the best information attainable it was presumably prepared and introduced in the Senate by Oliver Ellsworth, who was chairman of the Judiciary Committee of the Senate and author of the bill under which the Federal judiciary system was established.

It would be interesting and instructive to follow the legislative history of the bill and note what changes, if any, were made in the original draft, but as the proceedings of the early sessions of Congress were not officially reported, there is no authentic record of the debate which it is fair to assume was had on so important a subject. But in the private journal of William Maclay, who was a Senator from 1789 to 1791, I find the following references to the progress of the bill in the Senate:

January 26, 1790—A committee was moved for, to bring in a bill for ascertaining crimes and punishments under the Federal legislature. The committee was appointed, withdrew for a few moments into the Secretary's office, returned with the old bill, which had been before us last session, and reported it. This was really ridiculous, but the vote of yesterday seemed to call for it.

January 27.—The bill of yesterday was read by paragraphs. It was curious to see the whole Senate sitting silent and smiling at each other, and not a word of remark made or making on the bill. Ellsworth rose to inform the Senate that it was the same bill which had been gone through all the forms in the last session. Strong moved an amendment, however, that the judges should issue the warrants for execution of criminals. I rose and showed from the Constitution that the President of the United States had the power of granting pardon in all cases except those of impeachment; that by the judges taking on them to issue warrants the opportunity of his granting pardon was taken away. Ellsworth, according to custom, supported his bill through thick and thin. There was a great deal said, and I was up three or four times. I moved a postponement of the clause, and it was carried. Hawkins, the new member from North Carolina, rose and objected to the clause respecting the benefit of clergy. He was not very clear. I, however, rose, really from motives of friendship—I will not say compassion—for a stranger. I stated that as far as I could collect the sentiments of the honorable gentleman he was opposed to our copying the law language of Great Britain; that, for my part, I wished to see a code of criminal law for the Continent, and I wished to see a tone of originality running through the whole of it. I was tired of the servility of imitating English forms. I could not say whether the bill would not be materially injured by leaving out the clause. I wished it should be left out, but I thought at any rate it had better be postponed. It was postponed.

January 28.—The bill for crimes and punishments was taken up. Strong's amendment was rejected, and I offered one, which was also rejected, and the bill passed.

Provisions of act.

The act was entitled "An act for the punishment of certain crimes against the United States," and consisted of thirty-three sections. The first crime defined was treason, and the punishment fixed therefor was death. It was significant of the loyalty and devotion members of Congress felt for their country that in the first law of Congress against crimes treason should be the first crime defined. Murder in any place within the exclusive jurisdiction

of the United States was also punishable by death, and the court, in addition to such sentence, might, at its discretion, add to the judgment that the body of such offender shall be delivered to a surgeon for dissection; and any attempt, by force, to rescue the body of such offender, after execution, from the custody of the marshal while delivering the same to the surgeon, or to rescue such body from the surgeon to whom it had been delivered, was also an offense, and each was punishable by fine and imprisonment, and these singular provisions are retained in the present law.

Piracy was defined by the act, and the penalty of death against such offense was provided. The commission of any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of authority from any foreign prince or State, was punished by death, and the same punishment was inflicted in case of accessories before the fact of piracy. Counterfeiting or forging any certificate or other public security or indent of the United States was also punishable under the act with death. Stealing or carrying away any record, writ, process, or proceeding from any court of the United States, by reason of which any judgment should be reversed or rendered void, was punishable by fine and imprisonment and whipping not exceeding thirty-nine stripes.

Larceny of the personal goods of another on the high seas or any place within the exclusive jurisdiction of the United States was punishable by fine not exceeding the fourfold value of the property so taken, and by being publicly whipped not exceeding thirty-nine stripes, and the same punishment was applied to receivers of stolen goods.

Perjury was punishable by imprisonment and fine and standing in the pillory for one hour, and to be thereafter rendered incapable of giving testimony in any of the courts of the United States until such time as the judgment against the offender should be reversed. With the exception of standing in the pillory, the punishment for this offense is the same now as it was more than a hundred years ago, punishment by whipping and standing in the pillory having been prohibited by the act of 1839. Corruption of blood or forfeiture of estate was prohibited in case of conviction of any offense. Under the provisions of the act of September 24, 1789, bail should be admitted in all criminal cases, but where the punishment might be death, it must be admitted by the Supreme or Circuit Court, or by a justice of the Supreme Court or a judge of a District Court.

The act provided that in cases of treason, the defendant should receive a copy of the indictment, together with a list of the names and residences of the jurors and witnesses for the Government, three full days before the trial; and in other capital cases a copy of the indictment and list of the jury should be given the defendant two days before the trial. This is the provision of the present statute in cases of treason; but in other capital cases the defendant shall be served with a copy of the indictment and list of the jurors and witnesses at least two entire days before the trial, the difference being that under the present law the defendant is entitled to a list of the witnesses for the Government, which he was not entitled to under the act of 1790.

When tried for treason, or other capital offense, the accused was allowed to be defended by counsel learned in the law, and upon his request the court was required to assign such counsel, not exceeding two, as he should desire for his defense, and he was entitled to the

process of the courts to compel the attendance of his witnesses. There was an express provision in the act that the benefit of clergy should not be allowed in any case in which, by any Federal statute, the punishment was death. No prosecution for treason, or other capital offense, excepting murder and forgery, as defined by the act, should be had unless the indictment was found within three years after the commission of the offense, and no prosecution should be had for any offense not capital unless the indictment or information was found within two years after the offense was committed; but these provisions did not extend to fugitives from justice. It will be observed from the foregoing provisions that the only crimes against which the statute of limitations did not run were murder and forgery. There has never been any Federal statute limiting the time in which a person charged with murder might be prosecuted, but since the act of 1873 prosecutions for forgery are limited to three years after the commission of the offense.

Such is a brief synopsis of the first crimes act passed by the American Congress. While it defined and provided for the punishment of many crimes, it contained few provisions relative to criminal procedure. It contained no direction concerning the arrest of offenders, but such procedure was governed by the act of 1789, which authorized any Federal justice or judge, or any justice of the peace, or other magistrate of any of the United States, to arrest any offender and imprison him, or admit him to bail, for trial before the proper court, according to the usual mode of process in such cases and at the expense of the United States. Nor was any provision made in the act for summoning or impaneling grand or petit jurors, nor of how many the grand jury should consist, nor what number of such jurors should be necessary to find an indictment. It was a singular omission of our criminal legislation that Congress did not enact a uniform law regulating the methods of procedure pertaining to grand jurors, such as the manner of their being summoned, their selection and qualifications, the number necessary to constitute such jury, and the number necessary to return an indictment, until March 3, 1865, a period of seventy-six years from the formation of the Government. The whole process of impaneling grand and petit juries prior to the passage of the act of 1865 was controlled by the act of 1789, under which the Federal judiciary system was established. By the terms of that act grand and petit jurors to serve in the United States courts were designated by lot or otherwise, according to the mode prevailing in the respective States, and were to have the same qualifications and be summoned in the same way as similar jurors in the State courts, and when from challenge, or other cause, there was no jury to determine a civil or criminal cause, the court might order the marshal to return jurymen de talibus circumstantibus until the jury was obtained, and in case the marshal or his deputy was disqualified from acting, the court might appoint some disinterested person to act in his stead.

Grand Jurors.

The act of 1865 changed the law as to the grand jury and made its operation uniform throughout the country. It provided that such jury should consist of not less than sixteen nor more than twenty-three persons, and if less than sixteen of the persons summoned should attend, they should be placed on the jury, and the court should order the marshal to summon from the body of the district a sufficient number of persons to complete the jury, and

when a challenge to a juror was allowed and there were no other jurors in attendance to complete the jury, the court should order the marshal to summon a sufficient number of persons for that purpose from the district, and not from the bystanders; and that from the persons accepted as grand jurors the court should appoint the foreman, who should have power to administer oaths or affirmations to witnesses; and that no indictment should be found, nor should any presentment be made, without the concurrence of at least twelve of the jury.

Jurors.

The method of summoning grand and petit jurors was made uniform by the act of June 30, 1879, which provided that such jurors should be publicly drawn from a box containing at the time of each drawing the names of not less than three hundred persons possessing the requisite qualifications for jurors, which names should be placed in said box by the clerk of the court and a commissioner appointed by the judge of the court, which commissioner should be a citizen of good standing, a resident of the district in which such court was held, and a well-known member of the principal political party in the district where the court was held which was opposed to the party to which the clerk belonged; that the clerk and commissioner should each place one name in said box alternately, without reference to party affiliations, until the required number was placed therein, and that no citizen possessing all other qualifications for a juror should be disqualified to serve as a grand or petit juror in any Federal court on account of race, color, or previous condition of servitude.

In 1791 Mr. Justice Wilson, of the Supreme Court of the United States, in a celebrated charge which he delivered to the grand jury in the circuit court of the United States for the district of Virginia, referred at length and with great particularity to the crimes act of 1790, and said that it provided for seven different punishments—disqualification for office, fine, imprisonment, whipping, pillory, incapacity to give testimony, death—and charged the grand jury that, under the act, the following crimes were punishable by death:

Capital crimes under act of 1790.

1. Forging public securities.
2. Procuring or assisting to forge public securities.
3. Uttering or causing to be uttered public securities which are forged.
4. The rescue of persons convicted of capital crimes.
5. Piracy.
6. Robbery.
7. Acts of hostility as specified in the law.
8. Making revolt in a ship.
9. Violently hindering the captain of a vessel from fighting in its defense.
10. Piratically running away with any vessel.
11. Murder.
12. Treason.
13. Accessory before the fact of murder, robbery, or other piracy on the high seas.

The number of crimes punishable by death under Federal statutes, until the passage of the act of January 15, 1897, commonly known as the Curtis act, was from time to time enlarged, and at the date of the last mentioned act embraced the following offenses:

Capital crimes prior to Act of 1897.

1. Being an accessory before the fact to murder, robbery, or other piracy upon the seas.
2. Murder within places under the exclusive jurisdiction of the United States, on land or sea.
3. Rape committed within places under the exclusive jurisdiction of the United States, on land or sea.

4. Arson in forts, navy-yards, etc., under the jurisdiction of the United States.

5. Setting on fire or destroying vessel of war of the United States within the admiralty jurisdiction thereof.

6. Casting away or destruction of a vessel by owner, in fraud of insurer.

7. Casting away or destruction of vessel by person other than the owner.

8. Piracy as defined by the law of nations.

9. Prevention by seamen of a commander from defending his vessel.

10. Robbery on the seas, in or upon any vessel, or upon any ship's company of any vessel, or the lading thereof.

11. Robbery on shore by crew of a piratical vessel.

12. Any offense committed on the high seas which, if committed within a county, would be punishable by death.

13. Acts of hostility by a citizen against the United States, under color of a commission from a foreign state or prince.

14. Acts of hostility by a subject or citizen of a foreign state against the United States, contrary to the provisions of treaty, where such treaty makes such acts piracy.

15. Being engaged in the slave trade.

16. Seizing or landing a negro or mulatto with intent to make him a slave.

Act of 1897.

The act of 1897 in nearly all cases abolished capital punishment and substituted therefor imprisonment for life. It provided that where the accused is found guilty of the crime of murder or rape in any place under the exclusive jurisdiction of the United States, or upon the high seas within the admiralty and maritime jurisdiction of the United States, or if anyone upon such waters maliciously wounds, poisons, or shoots another, which results in death, the jury might qualify their verdict by adding thereto "without capital punishment;" and whenever the jury returned such qualified verdict, the defendant should be sentenced to imprisonment at hard labor for life. The act further provided that, except in treason, murder, and rape, when a person is convicted of any offense the punishment of which was death, he shall be sentenced to imprisonment at hard labor for life, and when any person is convicted of any offense the punishment of which is death, or a lesser punishment, in the discretion of the court, the maximum punishment shall be imprisonment at hard labor for life. The whole system of capital punishment under Federal statutes which had been in force since the act of 1790 was swept away by this act, and as the statutes now stand the penalty of death can be enforced in only three cases for offenses committed against the laws of the United States. These are treason, murder, and rape, but in the case of treason the statute permits other punishment than death, at the discretion of the court, and in the case of murder and rape it permits other punishment than death, at the discretion of the jury, so that since the passage of the act of 1897 no offense could be committed against the Government in which death was the only penalty. The abolition of the death penalty and the substitution therefor of milder punishment was the result of long and energetic action on the part of many persons, most prominent of whom was Mr. Curtis, a member of Congress from New York, who was chiefly instrumental

in having the act passed and for whom it was named. It was doubtless the argument that so severe a penalty as death deters the jury from convicting in many cases where conviction could be obtained if a lighter penalty could be inflicted that caused Congress to change the penalty in so many grave offenses. As a result of this legislation the United States is one of the few countries in the world which does not punish piracy with death. It is too near the passage of the act to justify an opinion on its virtues or whether it can be regarded as a true criminal reform. To determine what punishment should be administered against offenders is a difficult problem, and there does not seem to be any exact rule for determining it. Humboldt, in his Sphere and Duties of Government, lays down the following rule on the subject in the close of his chapter on criminal laws:

> The most severe punishment must be no other than that which is the mildest possible according to particular circumstances of time and place. From this all other punishments must be determined, in proportion to the disregard manifested for the rights of others in the crimes committed. Hence, the severest punishment must be reserved for him who has violated the most important right of the State itself; one less severe must be inflicted on him who has only violated an equally important right of an individual citizen, and lastly, one still milder must be applied to him who has only transgressed a law designed to prevent such injuries.

From 1790 till 1862 the punishment for treason in the United States was death; but in the latter year Congress changed the punishment and made it as follows:

> Every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years and fined not less than ten thousand dollars, * * * and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States.

This modification of the penalty grew out of the condition existing between the Northern and Southern sections of the Federal Union by reason of the civil war. When the act making the change was under consideration in Congress, it was urged in its favor that, as there might be many grades of guilt, it would be impossible in all cases to secure a conviction if death was to be the only penalty, and as there might also be instances where parties would be influenced to commit acts of treason against their judgment and desire, the death penalty in such cases would be too severe. These tolerant views of the subject prevailing, Congress passed the act, and it was signed by Mr. Lincoln as President, and is still the law.

Slavery acts.

Four years after the passage of the crimes act, Congress passed the first of a series of five acts which were to have an important influence upon the political, moral, and legislative history of our country. They may be properly classified as a group of acts directed against the slave trade, the first of which was passed in 1794 and the last in 1820, and it is an impressive fact that at the very threshold of our national existence Congress went to the verge of its constitutional power in restricting the slave traffic, especially when it is remembered that at the adoption of the Constitution there was but one State where slavery did not exist.

As the result of the debate in the constitutional convention over the question of slavery a compromise clause was inserted in the Constitution, as follows:

> The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

Under this provision it was constitutional to import negroes or mulattoes as slaves from any foreign country into any State of the Union, during the limitation prescribed by the Constitution, unless the laws of such State prohibited such importation. The act in question was entitled "An act to prohibit the carrying on of the slave-trade from the United States to any foreign place or country," and made it unlawful for any citizen of the United States or any person coming into or residing within the United States, as master or owner, to build, equip, load, or otherwise prepare any ship within the United States, or cause any vessel to sail from the United States to any foreign country for the purpose of carrying on traffic in slaves.

Six years later Congress passed another act making it unlawful for any citizen of the United States, or any person residing therein, to hold or have any right or property in any vessel employed in the transportation of slaves from one foreign country or place to another, and further provided for the libeling and forfeiture of said vessel. The act also made it unlawful for any citizen of the United States, or person residing therein, to serve on any vessel of the United States which was employed in the transportation of slaves from one country or place to another. Authority was also given any vessel commissioned by the United States to sieze any vessel employed in the carrying of slaves from one foreign country to another, and the act further provided for the forfeiture of the seized vessel, together with her tackle, apparel, and guns, and all of her effects, in any circuit or district court of the United States.

Pursuing the policy manifested in the last two acts, Congress, in 1803, passed a law making it unlawful for any officer of a ship, or any person, to bring or cause to be brought into the United States any person of color, not being a native or citizen or registered seaman, if the place to which said person shall be brought should be situated in any State which by law had prohibited the importation of such person; and it was further made unlawful for any ship or vessel, having on board such prohibited persons, to be admitted into any port of the United States.

The constitutional limitation against importing persons of color into the United States for the purpose of making them slaves being about to expire, Congress passed an act in March, 1807, "To prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the first of January, one thousand eight hundred and eight." This act was very complete in its provisions against the slave trade. Every reasonable precaution seemed to have been taken by Congress in order to effectually prevent such traffic, and a more stringent measure could hardly have been enacted, prohibiting, as it did, every conceivable phase of the trade, and providing severe penalties for anyone violating its provisions.

Eleven years later, in 1818, Congress passed an additional act, by which it repealed the first six sections of the act of 1807, but reenacted them in more comprehensive language, and made the offense of dealing in slaves more hazardous than it had theretofore been, even going so far as to provide that if any citizen of the United States, under certain prohibitions therein specified, should engage in the slave trade, he should be adjudged a pirate, and on conviction should suffer death.

The reference to these acts will recall to every student of our political history the debates which occurred in the early history of our

country over the question of slavery, a most interesting reference to which is found in a recent life of James Madison, by Sydney Howard Gay. In a footnote the author says:

> When the question of prohibiting the carrying on of the slave trade from American ports came up, one John Brown, of Rhode Island, said in Congress, "Our distilleries and manufactories were all lying idle for want of an extended commerce. He had been well informed that on the African coasts New England rum was much preferred to the best Jamaica spirits, and would fetch a better price. Why should it not be sent there and a profitable return be made? Why should a heavy fine and imprisonment (of slave traders) be made the penalty for carrying on a trade so advantageous." Sixty years later still, there was another Brown in Providence, R. I., who was a member of the committee of the Kansas Aid Society, of New England. He was about to withdraw from it for want of time to attend to his duties—had, indeed, actually sent in his resignation—when news came of the doings of another John Brown at Harpers Ferry. The resignation was instantly recalled, with the remark that it was not a time for Browns to seem to be backward on the question of slavery.

Neutrality acts.

Influenced, doubtless, by the motive to avoid international complications, which seemed likely to arise from the sympathy felt in the United States toward France by reason of the attitude that nation and England had assumed toward each other, and desiring that the United States should maintain a position of absolute neutrality between these great powers, Congress on the 5th of June, 1794, passed an act making it a high misdemeanor, punishable by fine and imprisonment, for any citizen of the United States within the territory and jurisdiction thereof to accept a commission to serve any foreign prince or state in time of war, on land or sea, and further making it a high misdemeanor, punishable by fine and imprisonment, for any person within the territory or jurisdiction of the United States, to enlist or hire another to enlist, or to go beyond the jurisdiction of the United States with the intention of entering the service of any foreign prince or state, either as soldier or marine. The act further made it unlawful for any person within any of the ports, harbors, or waters of the United States to fit out and arm, or attempt to fit out and arm, or be concerned in the same, any ship or vessel with the intention that such vessel should be employed in the service of any foreign prince or state to commit hostilities upon the citizens, subjects, or property of any foreign prince or state with whom the United States was at peace. Increasing or augmenting the force of any ship for said purpose, or setting on foot within the territory or jurisdiction of the United States any means for any military expedition or enterprise to be carried on against the territory or dominions of any foreign prince or state with whom the United States was at peace, was also made a misdemeanor, and jurisdiction to try and punish persons offending against such provisions was conferred upon the district courts of the United States. There was a provision in the act that in every case in which a vessel was fitted out and armed, or in which the force of any vessel of war was increased, contrary to the provisions of the act, or where any process issued by any United States court was disobeyed or resisted by any person or persons having the custody of any vessel of war, it should be lawful for the President of the United States, or such person as he might designate for that purpose, to employ such part of the land or naval forces or the militia thereof as should be necessary for taking possession of such vessel or ship; and the President, or anyone whom he might designate for that purpose, was also empowered to use the land or naval forces to compel any foreign ship or vessel to depart from the United States

in cases in which, by the laws of nations or the treaties of the United States, they ought not to remain within the United States. The act, by express provision, was limited in its operations to the period of two years, but subsequently such limitation was repealed.

In April, 1818, Congress passed another act of a similar character, for the punishment of certain crimes against the Government, which was more comprehensive than any which had been passed, and repealed all preceding acts on that subject.

Counterfeiting.

The first act making the counterfeiting of the coin of the United States an offense was passed by Congress on the 21st of April, 1806, but the law expressly recognized the concurrent jurisdiction of the several States over such crimes.

Alien and sedition act.

On the 14th of July, 1798, an act was passed making it a high misdemeanor for any persons to form a combination to impede the operation of any law of the United States or preventing any person holding an office under the Government of the United States from performing the same or executing his duty thereunder. The same act provided for the punishment, by fine and imprisonment, of any person convicted of writing, printing, uttering, or publishing, or causing the same to be done, or any person who should knowingly and willingly aid in writing, printing, or publishing any false, scandalous, or malicious writing against the Government of the United States, or either of the Houses of Congress, or the President of the United States, with intent to defame the Government or either of said Houses of Congress or the President, or to bring them, or either of them, into disrepute, or to excite against them, or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to incite any unlawful combination therein, for opposing or resisting any law of the United States, or any act of the President of the United States done in pursuance of such law or the powers vested in him by the Constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile designs of any foreign nation against the United States, their people or Government; but the act provided that upon the trial of any person for the commission of any such offense it should be lawful for the defendant to give in evidence in his behalf the truth of the matter contained in the publication complained against; and the act further provided that the jury in such case should have the right to determine the law and fact under the direction of the court, as in other cases. The act was limited in its operations until the 3d day of March, 1801. This was the famous Alien and Sedition Act under which so many prosecutions and convictions for libel were had, and which largely contributed to the overthrow at the next Presidential election of the Federal party and the election of Mr. Jefferson as the successor of Mr. Adams—a defeat from which the Federalists never recovered.

The following year Congress substantially extended the provisions of this act by providing that if any person, being a citizen of the United States (whether actually residing therein or not), should, without the permission or authority of his Government, carry on any written correspondence or intercourse with any foreign government or officer or agent thereof, with intent to influence the measures or conduct of such foreign government, or defeat the measures of his own Government, should be guilty of a high misdemeanor and punishable by fine and imprisonment.

Act of 1825.

Notwithstanding the passage of the crimes act, and various subsequent acts relating to crimes, the criminal laws of the United States were not adequate to punish offenses which were being committed, and this was noticeably so in offenses on the high seas and other places within the maritime jurisdiction of the Government. No one appreciated the deficiency of the laws in this respect more than Mr. Justice Story, of the Supreme Court, and it was mostly due to the efforts of that great and illustrious jurist that Congress, in 1825, passed a new crimes act. To show the deep interest Justice Story took in the matter, and that he drafted a bill on the subject, and his efforts to secure its passage by Congress, I quote from letters he wrote prominent and influential men, calling their attention to the necessity of additional criminal legislation, and urging their assistance in securing its passage.

On the 27th of May, 1813, he wrote his friend Nathaniel Williams, then a member of Congress, as follows:

I sent Mr. Pinckney a few days since some sketches of improvements in the criminal code of the United States. It is grossly and barbarously defective. The courts are crippled; offenders, conspirators, and traitors are enabled to carry on their purposes almost without check. It is truly melancholy that Congress will exhaust themselves so much in mere political discussions and remain so unjustifiably negligent of the great concerns of the public. They seem to have forgotten that such a thing as an internal police organization is necessary to protect the Government and execute the laws. I believe in my conscience many members imagine that the laws will execute themselves. This very day I had an application to discharge a soldier from imprisonment who was arrested for debt. The law has declared him free from arrest, but the courts of the United States are expressly prohibited from issuing a writ of habeas corpus, except in certain specified cases, and this is not within the exception. The consequence is that he must remain in jail, and so might all the soldiers of the army if they were cantoned in Massachusetts. I have been told that the service has suffered exceedingly from fraudulent arrests; will Congress ever provide against such abuses? Pray, speak to Mr. Pinckney on this subject and urge him to apply his talent to Congress at this session. Energy, promptitude, and precision are necessary, or the nation is ruined.

On the 3d of August following he again wrote Mr. Williams:

I am wearied with perpetual complainings to you and to the Government as to the deficiencies of our criminal code. A disgraceful affair has happened in Boston of the rescue of a prize by the owners. I should not be at all surprised that the actors should escape without animadversion, owing to defects in our criminal laws. Nor should I be astonished that in all cases of American vessels seized, trading with the enemy, forcible rescues should be attempted hereafter even against our national ships. What Congress mean by their gross and mischievous indifference to the state of the criminal code, I know not. In my opinion, the Government will be completely prostrated unless they give jurisdiction to their courts and a common-law authority to punish crimes against the United States. One would suppose that Congress believed the millennium was at hand, and that laws will execute themselves. I wish with all my soul that they would attend a little less to mere popular topics calculated to secure their elections, and a little more to the real and permanent interests and security of the Government. What think you of a government where public crimes on the seas are, with very few exceptions, left wholly unpunished, and crimes on the land are suffered to remain without the least criminal action?

A few years after writing these letters Justice Story drafted a bill entitled "A bill further to extend the judicial system of the United States," in which he provided that the Federal courts should have jurisdiction to punish crimes against the Government. Commenting on this provision of the bill, in a letter to Mr. Pinckney, he says:

The criminal code of the United States is singularly defective and inefficient. There are, in the statutes of the United States, prohibitions against doing some acts, and mandates to do others, which have no penalties annexed to them. But this is a very small grievance. Few, very few, of the practical crimes (if I may so say) are

now punishable by statutes, and if the courts have no general common-law jurisdiction (which is a vexed question) they are wholly dispunishable. The State courts have no jurisdiction of crimes committed on the high seas or in places ceded to the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity. Surely in naval yards, arsenals, forts, and dockyards, and on the high seas a common-law jurisdiction is indispensable. Suppose a conspiracy to commit treason in any of these places, by civil persons, how can the crime be punished? These are cases where the United States have an exclusive local jurisdiction. And can it be less fit that the Government should have power to protect itself in all other places where it exercises a legitimate authority? That Congress have power to provide for all crimes against the United States is incontestable.

The letter continues—

The printed bill was originally prepared by myself and submitted to my brethren of the Supreme Court. It received a revision from several of them, particularly Judges Marshall and Washington, and was wholly approved by them, and, indeed, except as to a single section, by all the other judges. Judge Johnson expressed some doubt as to the eleventh section; but, as I understood him, rather as to its expediency than the competency of Congress to enact it. I think that I am at liberty to say that it will be satisfactory to the court if it is passed. It will, indeed, give us more business, and we have now as much as we wish. But it will subserve great public interests, and we ought not to decline anything which the Constitution contemplates and the public policy requires.

May I add that if I shall be so fortunate as to meet your opinions on this subject, and the public so fortunate as to interest your zeal and talents in the passage of the bill, it will establish an epoch in our judicial history which will be proudly appealed to by all who in truth and sincerity love the Constitution of the United States. It will be a monument of fame to the statesman who shall achieve it, which being independent of the political opinions of the day, will brighten as it rises amid the dust and the ruins of future ages.

This bill seems never to have passed Congress, but in 1818 a special bill was prepared by Justice Story relating to the punishment of crimes, which was made the basis for the crimes act of 1825, and in reference to which he wrote Mr. Webster on the 4th of January, 1824, as follows:

You are aware that the criminal code of the United States is shockingly defective. I see that the subject is before you. I have a copy of Mr. Daggett's bill in 1818, which was pretty accurate (as I have some reminiscences), and if you can not find a copy of it I will send you mine. I should prefer a code in the form of articles, and will assist in drawing it if necessary.

His son, W. W. Story, in his Life and Letters of Joseph Story, from which the above extracts are taken, says that the bill referred to in his father's letter to Mr. Webster as Daggett's bill in 1818 was the one which his father had prepared.

The crimes act of 1825 was the second effort on the part of Congress to enact a complete criminal code, but it was far short of what its author hoped it would be. Justice Story fully realized that his efforts to secure the passage of a criminal code which would adequately provide for the punishment of the prevailing crimes had largely failed, and that it was only a part of the bill which he had prepared on the subject.

Nearly twenty years afterwards he wrote the chairman of the Judiciary Committee of the Senate as follows concerning it:

The crimes act of 1825 was designed to cure some of the more important defects in the act of 1790. That act, as I know, contains only 26 sections out of a bill consisting of more than 70 sections, which was drawn from a careful revision of the criminal code of England, and especially from the Criminal Law Consolidation Acts of Sir Robert Peel. The bill of 70 sections passed, I think, twice in the Senate, but was always passed over by the House of Representatives, from the supposed want of time to examine it. The act of 1825 was then selected from the larger bill in the hope that, from its being comparatively short, it might be passed to cure some of the more important defects.

Referring to the act of 1825 Mr. W. W. Story, in his work already referred to, says:

> It is the famous crimes act which has generally been attributed to Mr. Webster, and which, in 26 sections, has contributed so greatly to the improvement of the criminal code of this country. * * * Since the passage of the previous act of 1790 no legislation upon it had taken place in Congress. The act is entitled to high praise for its large and valuable provisions in the then infant state of the national institutions. But the country had entirely outgrown it. The defects in the system were so numerous that half of the most notorious crimes, which the General Government was alone competent to redress, were beyond the reach of judicial punishment. For instance, burglary, arson, and other malicious burnings in our forts, arsenals, navy-yards, and light-houses were wholly unprovided for; and experience had abundantly proven that a lapse of thirty years had made our criminal code, for practical purposes, almost worthless. The act of 1825 cured most of these defects and secured great practical benefits to the country. If it failed to create a complete system it was because of the obstacles attending the passage of the measure, which were not only complicate and extensive, but which aroused party feelings and party strifes. To Mr. Webster is due the credit of carrying it through Congress; to my father, that of creating it.

This act provided penalties for many new offenses. Many of the sections were devoted to defining what should constitute maritime offenses, and prescribed punishment for the same. Others provided for the punishment of any officer of the United States who should be found guility of extortion, and defined and punished the crime of perjury, and the procuring of perjury in cases where an oath was required to be taken by the laws of the United States; but omitted as a part of the punishment for this offense that portion of the penalty described by the act of 1790, which provided that persons convicted of perjury should be rendered incapable of giving testimony in any court of the United States until the judgment so given against them should be reversed.

The act also provided that on the arraignment of anyone for the commission of an offense less than capital, if the defendant should stand mute and refuse to plead or answer, the court should proceed with the trial as though a plea of not guilty had been made.

The remaining sections of the act were devoted to defining and punishing larceny from any United States bank, the forging of letters of attorney, or certificates of stock of any similar bank, or counterfeiting gold, silver, or copper coin, or debasing gold or silver coin coined at the mints of the United States, and defining and punishing conspiracy.

Labor Laws.

In 1868 Congress passed an act providing that eight hours should constitute a day's work for all laborers, workmen, and mechanics who might be employed by or on behalf of the Government of the United States. It was the first of a series of acts passed in the interest of the industrial classes and did much to promote a feeling of confidence and good will between employers and employees throughout the country generally. So far as I have been able to ascertain, this was the first legislation in the United States in which a given number of hours was made a legal day's work for general laborers and mechanics. The provisions of the act were from time to time enlarged, and in 1892 an act was passed making it an offense punishable by fine and imprisonment, or both, to require or permit a laborer or mechanic to work upon any of the public works of the United States more than eight hours in any calendar day except in cases of extraordinary emergency.

Nothing was done by Congress toward revising the laws relating to crimes after the act of 1825 until the passage of an act for the revision

of all the laws of the United States, which revision was completed and published in 1873—a period of almost fifty years, though many important acts relating to crimes were passed in the meantime.

General criminal code.

In this revision the crimes act constitutes Title Seventy of the Revised Statutes of the United States, and consists of two hundred and twenty-eight sections, divided into nine chapters. The first chapter relates to General Provisions, providing the manner of inflicting the death penalty; that no conviction or judgment shall work corruption of blood or forfeiture of estate; that punishment by whipping and standing in the pillories shall not be inflicted; that benefit of clergy shall not be allowed in capital cases; and contains a provision relating to the pardoning power.

The second chapter relates to Crimes Against the Existence of the Government. It defines treason and misprision of treason, and provides for the punishment of rebellion or insurrection against the United States, and against criminal correspondence with foreign governments, punishes seditious conspiracies and the recruiting of soldiers or marines to serve against the Government.

The third chapter is very comprehensive. It is entitled "Crimes Arising Within the Maritime and Territorial Jurisdiction of the United States," and embraces fifty-three sections. Within such jurisdiction it defines and punishes murder, manslaughter, rape, mayhem, bigamy, larceny, receiving stolen goods knowing them to be such, plundering vessel in distress, revolt or mutiny on shipboard, breaking and entering vessel, destroying or attempting to destroy vessel at sea, robbery on high seas, murder on high seas, equipping vessel for slave trade, arson, arson of armory, arson of war vessel, deprivation of timber lands, circulation of obscene literature, and many other offenses. It makes the crime of piracy, as defined by international law, apply to seven distinct offenses, when committed within the jurisdiction of the United States, and punishable by death.

The fourth chapter is devoted to Crimes Against Justice. It defines perjury and subornation of perjury, and prescribes the form of indictment in each of such offenses. In defining perjury it restores the element of punishment in that offense provided by the original act of 1790, which was omitted in the act of 1825, that a person convicted of perjury should be incapable thereafter of testifying in any court of the United States until the judgment against him was reversed. The chapter further punishes interference with process of the courts, destruction of public records, attempts to influence jurors, conspiracy to intimidate witnesses or parties to a suit, or to defeat the enforcement of the laws.

Chapter Five is devoted to Crimes Against the Operations of the Government, and is the longest and most comprehensive chapter in the title of crimes, consisting of sixty-eight sections, nine sections more than were in the crimes acts of 1790 and 1825. It is subdivided into crimes entitled forgeries, frauds, etc., counterfeiting coin, and postal crimes; the first classification covers the crime of perjury or counterfeiting the obligations of the Government; the second prohibits and punishes counterfeiting the coins of the United States, and the third relates to crimes against the postal facilities of the Government.

Chapter Six relates to Official Misconduct. It provides for the punishment of any officer of the Government who is guilty of extortion

under color of his office, attempting to bribe members of Congress or members of the judiciary, and punishes the acceptance of a bribe on the part of United States officers.

Chapter Seven is entitled Crimes Against the Elective Franchise and Civil Rights of Citizens. It protects citizens of the United States in their right to vote, and punishes any interference or attempt to interfere with their constitutional right or franchise. The provisions of this chapter, however, have largely been modified or wholly repealed by subsequent legislation.

Chapter Eight is devoted to the Punishment of Accessories, in connection with the general provisions thereon in chapter One.

Chapter Nine relates to Prisoners and their Treatment. It defines the manner in which Federal prisoners shall be treated, and punishes anyone violating the provisions in relation thereto.

In addition to these chapters the subject of Criminal Procedure is contained in the 18th chapter of the Judiciary Title, and the subject of Grand and Petit Juries in the Fifteenth chapter of the same title, while the subject of Limitations of Prosecutions constitutes the Nineteenth chapter of that title.

Jurisdictional acts.

The act of 1789, which established the Federal courts, conferred jurisdiction in criminal cases on the district and circuit courts, and made the jurisdiction of the circuit court final. This provision continued in force till the act of February 6, 1889—a period of one hundred years, during which time no review of any criminal case could be had in the Supreme Court. After the passage of this act the subject of the criminal jurisdiction of the Federal courts seems not to have occupied the attention of Congress till a few years ago, when that body again took it up and has since passed many important acts relating to it.

By the act of February 6, 1889, it was provided that in all cases of conviction of crime the punishment for which was death the final judgment of the lower court against the respondent should, upon his application, be reexamined, reversed, or affirmed by the Supreme Court of the United States on a writ of error, which should be allowed as of right and which should operate as a stay of proceedings on the judgment.

This was a most radical change from what had been the law for a century. It took the final jurisdiction in capital cases from the circuit court, where the first act passed by Congress on the subject had placed it and where it had been from the beginning of the Government, and conferred authority on the Supreme Court in capital cases to "reexamine, reverse, or affirm on a writ of error." Two years later this jurisdiction was enlarged by the act of March 3, 1891, which provided that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in cases of conviction of a capital "or otherwise infamous crime."

The jurisdiction of the Supreme Court was again limited by the act of January 20, 1897, which amended the act of 1891 by striking out the words "or otherwise infamous crime." The act of 1897 further provided that "appeals or writs of error may be taken from the District Courts or Circuit Courts to the Court of Appeals in cases of conviction of an infamous crime not capital." This limited the juris-

diction of the Supreme Court to capital cases only, where the act of February 6, 1891, had placed it, and in cases where conviction had been had for "infamous crimes not capital," final jurisdiction was placed in the circuit court of appeals.

A review of the criminal jurisdiction of the Federal courts from their beginning shows it as follows:

1. By the act of September 24, 1789, jurisdiction in criminal cases was given the district and circuit courts, and the jurisdiction of the circuit court was final. This act was in force one hundred years.

2. By the act of February 6, 1889, jurisdiction was given the Supreme Court where the punishment was death. This act was in force two years.

3. By the act of March 3, 1891, jurisdiction was given the Supreme Court in cases of conviction of a capital or otherwise infamous crime. This was in force six years.

4. By the act of January 20, 1897, the jurisdiction of the Supreme Court was again limited to capital cases only, and the final jurisdiction in cases of "infamous crimes not capital" was conferred on the court of appeals.

Humane provisions.

Harsh as the Federal criminal laws may seem, Congress passed many statutes which carefully guarded the rights of the defendant and contained generous provisions in his interest. The act of 1846 provides that when any person indicted in a Federal court should make affidavit that there were witnesses whose evidence was material to his defense, and that he could not safely go to trial without them, setting forth what he expected to prove by them, that they were within the district or within one hundred miles of the place of trial, and that he was not possessed of sufficient means to pay the fees of such witnesses, the court was authorized to order such witnesses subpœnaed at the expense of the Government, and section 3 of the act of August 3, 1882, contains more generous provisions concerning the hearing of any case under a claim of extradition by a foreign government when the accused makes affidavit that there are witnesses whose testimony would be material to his defense, that he can not safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses. Another statute, January 24, 1862, provides that no testimony given by a witness before either House of Congress, or before any committee of either House, should be used as evidence in any criminal proceeding against such witness in any court, except in a prosecution for perjury committed in giving such testimony, while another act of the same year changed the punishment for treason from death to imprisonment, fine, or death, at the discretion of the court; and under the act of June 1, 1872, when a poor convict sentenced to pay a fine or costs has been confined in prison for thirty days for the nonpayment of such fine or costs he may make application in writing to a commissioner, setting forth his inability to pay such fine or costs, and after notice to the district attorney the commissioner shall hear and determine the matter, and if it appear from such examination that such convict is unable to pay such fine or cost and that he has no property exceeding twenty dollars in value, except that which is exempt by law, he may, upon taking a prescribed oath, be discharged from prison. Another act, June 8, 1872, provides that in case of treason, or other capital offense, the defendant should be

entitled to twenty peremptory challenges of the jury, while the United States was entitled to only five; and on the trial of any other felony the defendant should be entitled to ten peremptory challenges and the United States to only three. Another act, March 3, 1875, provides that Federal prisoners when confined in a prison in a State or Territory which has no system of commutation for its own prisoners should have a deduction from their terms of sentence of five days in each calendar month during which no charge of misconduct had been entered against them, and that their term of imprisonment should be reduced to that extent; and that on the discharge of any Federal prisoner he or she should be provided by the warden of the prison with one plain suit of clothes and five dollars in money at the expense of the Government; while the act of March 16, 1878, permits any defendant to testify at his own request, and provides that his failure to make such request should not create any presumption against him, and the act of 1897 leaves it with the jury whether the sentence in murder and rape shall be death or life imprisonment, and in all other cases theretofore punishable with death fixes the penalty at imprisonment for life; and in addition to these provisions no one was denied the privilege of bail, and the writ of habeas corpus might always be applied for.

Much of the criminal legislation of the country relates to crimes the nature and character of which were not contemplated by Congress when it passed the acts of 1790 and 1825. It has grown out of the more recent necessities of the Government. Mr. Justice Miller gave several illustrations of this character of legislation in delivering the opinion of the court in ex parte Yarbrough (110 U. S., 659).

Human experience teaches that crime develops as civilization grows older and population increases, and this principle seems to be established by the experience of our own Government, for crimes against our national laws seem to have kept pace with our national development. The ingenuity of the artisan challenges and sharpens the ingenuity of the burglar. Post-offices are robbed almost as soon as they are established, and bank vaults are demolished upon their construction. Schools of crime are as accurate in what they teach as schools for educational purposes. The mechanical achievements of civilization are utilized in the refined arts of the criminal. The mail facilities of the country carry messages of death as they do messages of affection or business. The commission of a crime necessitates a law for its punishment and prevention, but the enactment of such a law develops a new crime which will evade the new law and thus make another law necessary. Crime and law follow each other, one trying to avoid, the other trying to punish and prevent. The great code of criminal law and criminal procedure as it now exists in the statutes of the United States is the result of more than a century of national experience in criminal legislation.

O